IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 857 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE OF GUJARAT
Versus
NATWARLAL MANISHANKER THANKI

==========

Appearance :
MR PRADIP D BHATE APP for Appellant

MR HM PRACHCHHAK for Respondent

==========

CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 16/08/2007

ORAL JUDGMENT : (Per : HONOURABLE MR. JUSTICE J. R. VORA)

1 This Criminal Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by learned Special Judge and 7th Fast Track Court, Porbandar, on 03rd of November, 2003, in Sessions Case No. 70 of 2000, whereby present respondent, being accused of Sessions Case, came to be acquitted by the Trial Court for the offences punishable under Sections 323 and 325 of the Indian Penal Code as well as for the offences punishable under Section 3(1)(10) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2 Learned APP Mr. Pradip D Bhate for the State and learned Advocate Mr. H.M. Prachchhak for the respondent were heard in detail. Leave to Appeal is granted. Appeal is Admitted. Learned Advocate Mr. Prachchhak waives on behalf of respondent.

3 Both the learned counsels have requested the Court to hear the Appeal finally as Record and Proceedings of the Trial Court is available with the Court and that they would supply necessary copies of evidence recorded and the documents produced before the Trial Court.

4 Request of both the counsels is granted and the matter is heard finally.

5 According to prosecution case, the incident occurred on 12th of December, 1997 at Porbandar and complaint of which came to be filed by minor Kishore Malde Shingrakhia, aged nine, on 13th of December, 1997 before Kamlabag Police Station, Porbandar. Accordingly, on 12th of December, 1997, complainant had been to his school and in the afternoon, during recess, while he was coming to his house for taking meal at about 3.00 p.m. he inquired about his brother Harish Maldebhai. It was learnt by him through other boys of his locality that all of them had been to pluck berry fruits (bore) for eating. Therefore, Kishore had been to call his brother Harish and he also plucked berry fruits from the garden. The accused came there and he shouted to drive them out of the garden. The other boys ran away while complainant Kishorebhai Maldebhai was caught and accused had beaten him and thrown him on the ground. There were stones on the earth and, hence, Kishorebhai Maldebhai received injuries on thigh. He went unconscious and shifted to hospital where on the next day his complaint came to be recorded by the police and the investigation was carried out by Head Constable and K.L. Vijuda, PSI Virambhai Karsanbhai Bokhria as well as by Dy. S.P. Balubhai Jethabhai Garchar.

A charge sheet came to be filed in the Court of Judicial Magistrate, First Class, Porbandar, which was registered as Criminal Case No. 3262 of 1988 and the said case came to be committed to the Court of Sessions at Porbandar and registered as Sessions Case No. 70 of 2000. The learned Sessions Judge framed charge against the accused for the above said offence on 29th of August, 2003 vide Exhibit – 4 to which the accused pleaded not guilty and, hence, the prosecution examined as many as 15 witnesses and produced on record voluminous documentary evidence. Thereafter, further statement of the accused was recorded on 9th of October, 2003 by the learned Additional Sessions Judge, in which the accused stated that the evidence of the prosecution was false and that he was innocent. After hearing learned APP as well as defence counsel and after taking into consideration written arguments submitted by the prosecution vide Exhibit – 47, learned Trial Judge came to the above conclusion to acquit the accused for the above said charges and hence this Appeal.

6 This being Appeal against the acquittal, it is required to note the gist of the evidence produced by the prosecution during trial.

6.1 PW-1 Devabhai Punjabhai Chanchia, examined at Exhibit-7, is the Medical Officer of Bhavsinhji Hospital, Porbandar,

examined the injured on 12th of December, 1997 at 3.00 p.m. and found that the injured had a fracture of femur bone. His surgery was conducted and he produced on record the certificate at Exhibit-8. Noteworthy it is to record that in history the injured stated before him that the injured had fallen down from a building from a height. He further stated that when the injured was brought before him, he was fully conscious.

6.2 PW-2 Exhibit -12 complainant injured Kishorebhai Maldebhai is examined and accordingly he stated that he went to the garden of the accused to pluck berry fruits and was caught by the accused and was thrown on the ground by which he received fracture injury on femur bone. He was unconscious at that time and in the evening he gained consciousness and thereafter the police made inquiry and he gave his complaint. He has been cross-examined by the defence in detail.

6.3 PW-3 Ramaben Maldebhai, Exhibit – 14, mother of the injured is examined by the prosecution and she stated that she had been out of the town and about in the afternoon she came to know through his son Harish that Kishore was beaten. She was informed that Kishore was lying near their house in a garden and from there she took him to

the hospital. According to her, on inquiry, Kishore stated to her that a neighbour had beaten him because he had been to pluck berry fruits from the garden. She has been cross-examined by the defence.

6.4 PW-4 Exhibit -15 Devshi @ Devjibhai Pithabhai is maternal uncle of injured Kishore. According to him, he came to know about the incident at 2.30 p.m. on that day. Ramaben, mother of Kishore and his sister brought Kishore to him and thereafter the injured was shifted to Bhavsinhji Hospital. He did not know about the incident but after two days he came to know that accused had beaten Kishore. When Kishore was admitted to Hospital he was unconscious. This witness has been cross-examined in detail by the prosecution.

6.5 PW-5 Rakeshbhai Lakhmanbhai, examined by the prosecution at Exhibit – 16, according to prosecution, was an eye witness, but he has not supported the prosecution case and was declared hospital.

6.6 PW-6 Dipakbhai Maganbhai, examined at Exhibit – 17, according to prosecution case, was an eye witness, but he also turned hostile and did not support the prosecution case.

6.7 PW-7 Harishbhai Maldebhai, younger brother of the injured is examined at Exhibit-18. At the time of deposition, he was aged 13. Therefore, the Trial Court ascertained whether he understood the sanctity of oath. He stated that he along with other boys of the locality had been to pluck berry fruits in the garden of one Kadviben. At that time, one person came there giving abuses. All of them had escaped but Kishore was caught. He identified the accused before the court. According to this witness, the accused caught hold of Kishore. He was beaten and thrown on the ground. Thereafter he went to inform his mother and his mother came where Kishore was lying and thereafter his mother and maternal uncle shifted the injured Kishore to the hospital. In his deposition, he stated that when Kishore was beaten, he had ran away and he did not know why Kishore was beaten by the accused.

6.8 PW-8 Dinesh Sajan, Exhibit–19, examined by the prosecution is an eye witness, aged 15 and minor at the time of deposition and after ascertaining whether the witness understood the sanctity of the oath, learned Trial Judge administered oath. According to him, on the day of incident, all of them including Harish had been to the garden of one Kadvibhai and at that time injured Kishore came there. The accused shouted and all of them had ran away, but Kishore was caught and was beaten by the accused, by which his leg was

broken. He was cross-examined by the prosecution and in para-5 of his deposition he stated that he was taken to the Police Station by maternal uncle of Kishore and he explained to him that the witness was required to state before the police that accused had caught Kishore and was beaten and, therefore, he was so deposing before the Court.

6.9 PW-9 Laljibhai Najabhai, examined at Exhibit – 20 and one of the eye witnesses and according to him all of them had been to the garden of Kadvibhai to pluck berry fruits, the accused shouted and all of them had ran away, but Kishore was caught and the accused had thrown Kishore on the ground and he received injuries on his leg. He also admitted in his cross-examination that when he went to the police for recording of the statement, maternal uncle of Kishore was with him and the matter was discussed before recording of statement. He also admitted that when accused came and shouted, they started running in the opposite direction and what happened behind, he did not know.

6.10 PW-10 Ranjitbhai Bhakabhai, examined at Exhibit – 21 is also one of the eye witnesses. According to him, the accused caught hold of Kishore and he was thrown on the ground, which he noticed at the distance. In his cross-examination, he admitted that he knew maternal uncle of Kishore and he stated to them that how Kishore was

injured and after knowing the incident from maternal uncle of Kishore, they stated the incident to the police.

6.11 PW-11 Hamirbhai Hardasbhai, examined at Exhibit – 22, noticed that mother of injured was shifting Kishore to the hospital in a rickshaw and Kishore was injured in the leg. He inquired that how Kishore got injuries, but he could not find anything. He has been cross-examined by the defence.

6.12 PW-12 Merubhai Tapubhai Chudasma, examined at Exhibit – 23, was Head Constable at the relevant juncture of Kamalbag Police Station, Porbandar. According to him, he was informed by the hospital about the incident, he went to Bhavsinhji Hospital and recorded the complaint of complainant, which he produced at Exhibit – 13. He admitted in his deposition that before recording of the complaint on 13th of December, 1997, Kishore had not declared the name of assailant. He also deposed before the court that from the record it appeared that one Mr. K.L. Vijuda, a Head Constable of same police station, had inquired from the injured and had recorded his statement at the hospital and he also admitted that all the papers were entrusted to him by Mr. Vijuda in respect of this crime before he recorded the complaint of the injured.

6.13 PW-13 Ravubhai Dadbhai Chudasma, examined at Exhibit – 27 was Police Station Officer of Kamlabag Police Station. On 12th of December about 19.35 hours on receiving information from a Doctor of Bhavsinhji Hospital through one Chandubhai, he recorded an entry in station house register. He produced that entry at Exhibit – 28 and according to this entry, it appeared that the injured had informed the Doctor that while he was going to the school he had fallen down and had received injuries. On 13th of December, 1997 at 21.40 hours Merubhai Chudasma forwarded the complaint to the Police Station and he registered the complaint and he produced necessary entry at Exhibits 29 and 30. Investigation was entrusted to PSI.

6.14 PW-14 Virambhai Karsanbhai Bokhria, examined at Exhibit - 33 was the then PSI of Kamlabag Police Station and he took charge of the investigation of this crime on 13th of December, 1997 and draw the panchnama of scene of offence, recorded the statements of the witnesses and arrested the accused. Thereafter he entrusted the investigation to Deputy Superintendent of Police. He has been cross-examined by the defence specially in respect of contradiction amongst the witnesses. Panchnama of scene of offence is produced at Exhibit – 34; panchnama of arrest of the accused is produced at

Exhibit – 35; panchnama of physical condition of the complainant is produced at Exhibit - 39.

6.15 PW-15 Balubhai Jethabhai Garchar, examined at Exhibit – 40 is the second and last Investigating Officer and was the then Deputy Superintendent of Police of that Sub-Division and according to him, on 14th of December, 1997, he took the charge of investigation from Bokhira and recorded other statements. He obtained medical certificate from the hospital and submitted charge sheet. He was cross-examined by the defence in detail.

7 Learned APP Mr. Pradip D Bhate has vehemently argued that this is a fit case wherein the accused is required to be convicted for the charges levelled against him. It is not, according to him, in dispute that the accused belonged to scheduled caste, for which the certificate is produced at Exhibit – 41. The injured was unconscious when he was admitted to the hospital and when he came to consciousness on next day, his complaint came to be recorded and Medical Officer has supported his say. According to learned APP, this is an incident serious in nature and an example of atrocity on scheduled castes, for which the special legislation has been enacted by the Parliament. Injured Kishore Maldebhai has supported the prosecution case and his complaint. In all

respects the supporting witnesses are his mother Ramaben and his maternal uncle Devshi @ Devjibhai Pithabhai. Exhibit – 18 minor Harishbhai Maldebhai; Exhibit – 19 Dinesh Sajan; Exhibit – 20 Laljibhai Najabhai and Exhibit – 21 Ranjitbhai Bhakabhai are also eye witnesses to the prosecution case and identified the accused before the Court. Exhibit – 22 Merubhai Tapubhai Chudasma recorded the complaint of injured in Hospital. Witness Virambhai Karsanbhai Bokhria and Dy. S.P. Balubhai Jethabhai Garchar are supporting the prosecution case. According to learned APP, the learned Trial Judge failed to appreciate the evidence in its real perspective and came to a wrong and erroneous conclusion to acquit the accused. There is no reason to disbelieve the injured witness, fully supported by the medical evidence, and in support, four other persons who are not interested, have identified the accused in the court and have supported the incident and prosecution case. According to learned APP therefore the conclusions arrived at by the Trial Court are perverse and required to be set aside after allowing the appeal and to convict the accused for the charges levelled against them.

8 As against this, the learned Advocate Mr. Prachchhak for the respondent submitted that the Trial Court has assigned proper and plausible reasons for acquittal and in appeal against the acquittal, unless

it is found that the reasons assigned by the Trial Court are perverse, no interference is permitted. It is therefore submitted that the Appeal is liable to be dismissed.

9 We have undertaken detailed scrutiny of the evidence recorded and the reasons assigned by the Trial Court. We have considered vital features of the matter and reasonable probabilities arising out of the circumstances of the case with reference to the contentions raised by both the sides. This is an appeal against the acquittal and the law is well settled that the order of acquittal cannot lightly be brushed aside, only because a second view is possible from the evidence recorded during trial, than a view taken by the Trial Court, unless and until, the reasons recorded by the Trial Court are found palpably wrong, perverse and demonstrably unsustainable, no interference in appeal against the acquittal is permitted. Therefore, in the present matter, it is required to scan carefully the reasons assigned by the Trail Court for the acquittal.

10 While going through the evidence in detail and the appreciation undertaken by the Trial Court, it clearly appears that two circumstances, which are of vital nature arising from the evidence recorded during the trial, must be taken into consideration as has been

taken by the Trial Court. From two important witnesses, who are independent i.e. witness Rakeshbhai Lakhmanbhai and Dipakbhai Maganbhai, have not supported the prosecution case. It cannot be ignored that PW-1 Devabhai Punjabhai Chanchia, Medical Officer, who first point in time examined injured Kishore, in categoric terms admitted that before him on 12th of December, 1997, the injured gave the history that he had fallen down from a building from a height and, therefore, he had received injuries. Necessary it is to note that Doctor also stated categorically that the injured was in complete consciousness when he was brought before him. This circumstance contradicts the evidence of injured. The very important one more circumstance is that at initial stage on 12th of December, 1997 itself Head Constable Vijuda, as per the evidence of Head Constable Merubhai Tapubhai Chudasma, recorded a statement of the injured and he entrusted this statement of the injured to Head Constable Merubhai Tapubhai Chudasma, but that statement was not on record of this prosecution nor Police Constable Vijuda could be examined by the prosecution. In these circumstances, the complaint filed late by 30 hours and having regard to the history given by the injured, a doubt is created in the prosecution case. It is also transpired from the evidence of Merubhai Tapubhai Chudasma that Head Constable Vijuda also recorded a statement of mother of the injured on 12th of December, 1997, but such statement

is not coming on record and this creates two sets of evidence in the prosecution case. It is necessary that what occurred immediately with reference to the history given by the injured to the Doctor and the statement recorded by Head Constable Vijuda is not coming to the light and the probability of manipulating a case against the accused after some hours is probabilised. In the evidence injured complainant stated that he did not know the accused before the incident and, therefore, it is far fetching to come to the conclusion that the accused knew that the injured belonged to scheduled caste and therefore though a certificate at Exhibit – 41 is issued, it cannot be concluded that the accused had committed offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The learned Trial Judge in para-17 of his judgment has given detailed reasons about the contradiction in the evidence of the complainant. Even the injured admitted that on the day of the incident at about 8.30 p.m. the police recorded his statement and the say is corroborated by the evidence of Head Constable Merubhai Tapubhai Chudasma and it further becomes doubtful as to why the earlier noted statements by Head Constable Vijuda are not the part of the prosecution case. PW- 3 Ramaben Maldebhai, Exhibit – 14 is not an eye witness, but from her evidence it is found that in cross-examination she stated that when Kishore was shifted to the hospital by her and her brother, the Doctor asked about the

injury and her brother stated that the injury caused to the injured might be on account of fall, at that time, they did not know that how injured had received the injuries and, therefore, the say of Ramaben about the conversation taken place between her and her son about the incident becomes doubtful. Prosecution witness Devshi @ Devjibhai Pithabhai, maternal uncle of the injured, examined at Exhibit – 15 also is not an eye witness, but from his evidence and from the cross examination, it transpired that the evidence of this witness is not helpful to the prosecution because he is not an eye witness, but his evidence is in contradiction to what is stated by injured witness. According to complainant, his complaint came to be recorded in the presence of this witness, while this witness denied when the complaint came to be recorded, what was the contents of the complaint. The other four witnesses examined by the prosecution and posing them to be eye witnesses includes younger brother of the injured i.e. Harishbhai Maldebhai, examined at Exhibit – 18. The evidence of Harish Maldebhai is doubtful and he stated in his deposition that at the time of the incident he had ran away and in all probability it appears that he might not have witnessed the incident. The other witnesses in categoric terms stated that when they had been to police station for recording of statement, maternal uncle of injured was with them and according to the instructions of maternal uncle they gave the statements before the

police. This evidence is discussed by learned Trial Judge in para-22 of his judgment.

11 While overall appreciation of the prosecution case is undertaken, we found that there are inherent infirmities in the prosecution case as stated above and, therefore, the learned Trial Judge came to the conclusion for acquittal of the accused. The complaint is filed late by 30 hours, for that no explanation is offered. There are two versions about the injuries of the injured. The eye witnesses appear to be tutored by the maternal uncle of the injured and, thus, no reliance can be placed upon those witnesses as it clearly appears from the cross-examination of the four witnesses including younger brother of the injured. However, the prosecution suppressed initial version of the injured recorded by Head Constable Vijuda on the day of the incident in the evening and, hence, the learned Trial Judge, for the above said reasons, came to the conclusion that the prosecution case was shrouded by the clouds of doubts and, hence, the accused was entitled to reasonable benefit of doubt. Therefore, the final order of acquittal. After careful scrutiny of the reasons and even scanning the evidence, we are unable to agree with the learned APP that the reasons assigned by the Trial Court are palpably wrong, demonstrably unsustainable, perverse or do not stand to reason. We do not find the judgment and

order impugned exceptionable and, hence, the following order.

12 In view of above, the Appeal stands dismissed.

(J. R. VORA, J.)

(SMT. ABHILASHA KUMARI, J.)

pnnair